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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE NIEBLA, Defendant and Appellant.	B205002 (Los Angeles County Super. Ct. No. BA257758)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed in part and remanded with directions.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Niebla[1] appeals from the sentence imposed after this court, in case number B193048,[2] ordered the matter returned to the trial court for resentencing. He was convicted by jury of kidnapping (count 1), two counts of inflicting corporal injury on a former cohabitant (counts 3 & 9), residential burglary (count 7), two counts of dissuading a witness by force or threat (counts 5 & 17), assault by means likely to produce great bodily injury (count 8), uttering a criminal threat (count 11), sexual penetration with a foreign object (count 12), forcible oral copulation (count 13), three counts of forcible rape (counts 14, 15, & 16), two counts of battery inflicting injury upon a peace officer (counts 19 & 20), and resisting an executive officer by use of force or violence (count 21). (Pen. Code, §§ 207, subd. (a);[3] 273.5, subd. (a); 459; 136.1, subd. (c)(1); 245, subd. (a)(1); 422; 289, subd. (a)(1); 288a, subd. (c)(2); 261, subd. (a)(2); 243, subd. (c)(2); 69.) He was also convicted of the misdemeanor offenses of assault (count 2), and committing a lewd act in the presence of a minor (count 22). (§§ 240; 273g.) The jury found that the sexual penetration with a foreign object, oral copulation, and rapes were committed during the commission of a burglary. (§ 667.61, subds. (b) and (e)(2).)[4]

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[1] Throughout the proceedings appellant was also referred to as Jorge Niebla.

[2] Pursuant to appellant's request, we have taken judicial notice of the opinion and the clerk's and reporter's transcript in this case.

[3] All further statutory references are to the Penal Code.

[4] In our previous opinion we observed: "All of defendant's convictions resulted from incidents which took place during two days in December of 2003. The principal victim was defendant's former girlfriend and cohabitant, Ana E. According to Ana, they lived together off and on for approximately three to four months."

In the factual background of our previous opinion and as relevant in the instant appeal, we stated in pertinent part, "During the early morning hours of . . . December 14 . . . [Defendant entered her residence through the] back of the house. . . . came up from behind [her] and struck her in the back of the head. Defendant struck her again and when she fell to the ground, he pulled her up by her hair. . . . Ana tried to scream for help, as her relatives lived across the street, but defendant clamped his hand over her mouth. He then struck Ana in the mouth with a closed fist. . . . [¶] As Ana lay on the floor, defendant continued to strike her in the face and head. . . . While they argued, Ana's

Appellant was sentenced to five consecutive 15 year-to-life terms and a consecutive determinate term of 39 years and eight months. He appealed, contending that the trial court failed to properly instruct the jury on the burglary charge and sentenced him improperly to consecutive life terms for the offenses of sexual penetration with a foreign object, oral copulation, and rape and concurrent terms for the offenses of assault and inflicting corporal injury on a former cohabitant. He also argued that his counsel was ineffective for failing to request a pinpoint instruction on the burglary charge. In anticipation that the matter would be remanded for resentencing, he asserted that the imposition of full consecutive sentences under section 667.6 violates his Sixth Amendment right to a jury trial. We affirmed the convictions and remanded the matter for resentencing. We concluded as to counts 12, 13, 14, 15, and 16, appellant could be sentenced to only one life term pursuant to section 667.61 and that the remaining

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two-year-old son entered the kitchen. Defendant picked up the boy, and told her to make some food. Defendant said that he was hungry, but he changed his mind and told Ana that he would rather have sex. As he held her son, defendant slid his hand down Ana's sweatpants and inserted his finger into her vagina. She pushed his hand away. Defendant put Ana's son on the floor, lifted Ana's sweater, and began sucking her breast. When she told him not to do that in front of her son, defendant replied that he did not care, he still wanted to have sex. [¶] Defendant picked up Ana's son, got a baby bottle, went into a bedroom, and got into bed with the boy. Defendant called for Ana to join them. When she came into the bedroom, defendant asked her to take off her clothes. Ana said no. Defendant removed her sweater. They began arguing. . . . At that point, the phone rang. . . . [¶] Defendant spoke to the person on the telephone for awhile and hung up. The phone rang again. Defendant answered, spoke, and hung up. This took place several times. . . . [¶] After the last call, defendant told Ana that he still wanted sex. He told her to take off her pants, but she refused, saying she was not going to do anything in front of her son. Defendant picked Ana up, placed her on the bed, and removed her pants. After telling her that he was going to change, defendant spread Ana's legs apart, and orally copulated her. Ana began crying and told defendant to stop. He got on top of her and inserted his penis into her vagina. He removed his penis, turned Ana onto her stomach, and put his penis into her vagina. He stopped, turned her over once again, and reinserted his penis. After he was finished, he lay next to Ana and her son and began talking. After 10 or 15 minutes, defendant got on top of Ana and penetrated her vagina with his penis. [¶] After the last act of intercourse, defendant fell asleep. Ana

sentences on those counts had to be determinate terms. We expressed no view as to whether consecutive sentences were mandatory pursuant to section 667.6, subdivision (d).

At resentencing, the court sentenced appellant on counts 12 through 16 to the middle term of six years, fully consecutive pursuant to section 667.6, subdivision (d), plus on count 12 an additional term of 15 years to life pursuant to section 667.61, subdivision (a).[5] The sentence on the remaining counts remained unchanged.

Following resentencing, appellant appeals. He contends sentence on count 12 is not authorized under the law and the trial court erred in imposing consecutive sentences under section 667.6, subdivision (d). He additionally contends the matter must be remanded to the trial court for it to determine all actual days appellant spent in custody through the date of resentencing. For reasons stated in the opinion, we remand the matter for resentencing and a determination of actual days appellant spent in custody.

DISCUSSION

I

Appellant contends as to count 12, the trial court erroneously imposed a determinate sentence in addition to the indeterminate sentence required by section 667.61. He contends the six-year determinate sentence must be stricken. Respondent and this court agree. Section 667.61 is an alternative sentencing scheme and not an enhancement. (*People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343.) "Under circumstances in which the alternative sentencing schemes of section[s] 667.61 and 667.71 apply, the sentencing court has discretion to choose one of the sentencing

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remained awake. She could not leave, as defendant had placed his arm across the top of her body. [Sometime later] Ana took her son . . . and drove away."

[5] The trial court mistakenly cited section 667.61, subdivision (a), which provides for a sentence of 25 years to life in state prison, instead of section 667.61, subdivision (b), which provides for a sentence of 15 years to life in state prison.

schemes and then must strike or dismiss, rather than stay, the sentence under the other. [Citation.]" (*People v. Snow* (2003) 105 Cal.App.4th 271, 283.)[6]

II

Appellant contends the trial court erred in imposing consecutive sentences on counts 12 through 16 without explaining how or why it reached its decision to sentence under section 667.6, subdivision (d). Respondent contends as appellant's trial counsel did not object to the court's omissions at resentencing, appellant forfeited any claim on that basis. (See *People v. Scott* (1994) 9 Cal.4th 331, 356-357.)

"*Scott* expressly exempts unauthorized sentences from its waiver rule. [Citation.]" (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1091.) Appellant claims consecutive terms on counts 12 through 16 under section 667.6, subdivision (d) would be an unauthorized sentence, because these offenses did not occur on separate occasions as required by that provision. If appellant is correct, the sentence was unauthorized and he has not waived the issue. (*Ibid*.)

Under section 667.6, subdivision (d), "[a] full, separate, and consecutive term shall be imposed for [specified offenses] if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of

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[6] Appellant argued this point in his previous appeal, respondent conceded, and we agreed. We stated, "On counts 12 through 16, the trial court believing that section 667.61 was an enhancement to the charge alleged, imposed both a determinate and indeterminate term. We agree with the parties that if the court imposes a life sentence pursuant to section 667.61, it may not impose an additional determinate term for that offense, as the sentencing scheme set forth in section 667.61 is an alternative sentence, not an enhancement. (See *People v. Acosta* (2002) 29 Cal.4th 105, 118-128.)"

itself, determinative on the issue of whether the crimes in question occurred on separate occasions. . . ."

The record reflects that at the resentencing hearing, the court and counsel had a brief, off-the-record discussion and that the trial court then gave counsel an opportunity on the record to be heard if desired. After indicating it had read and considered the People's written sentencing memorandum[7] and receiving no comments from counsel, the court stated, "pursuant to the request from the [C]ourt of [A]ppeal[], that it appears the view is – these – these crimes were not committed on separate occasions and that, therefore, the imposition of consecutive life terms was inappropriate. So I'm going to resentence you now." The court then sentenced appellant to full consecutive six-year prison terms for counts 12 through 16. The court stated "each of these terms are fully consecutive pursuant to provisions of 667.6[, subdivision] (d)."[8]

We agree with appellant's contention that the trial court did not adequately explain its reasons for imposing mandatory full consecutive sentences on counts 12 through 16. The court's statement did not provide a sufficient analysis of the facts to allow this court to determine why the trial court concluded that the sex offenses in these counts must have occurred on a separate occasion within the meaning of section 667.6, subdivision (d). (See *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1070.) The trial court was required to "consider whether, between the commission of one sex crime and another, the defendant

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[7] The People's sentencing memorandum states, "Counts 12-16 carry a determinate sentence range of 3, 6 or 8 years in state prison. Penal Code section 667.6(d) provides for the imposition of full term consecutive time on each of these charges. Further, the People ask this court to impose the high term of 8 years for each offense, based on the violent nature of the defendant's conduct toward the victim, Ana E." Defense counsel declined to respond further based on a discussion at sidebar.

[8] Appellant, in his reply brief, argues that because the trial court stated the sexual offenses were not committed on separate occasions the court was precluded from imposition of consecutive sentences under section 667.6, subdivision (d). The court's comments, however, were directed to the finding of "single occasion" for purposes of imposing life terms under section 667.61, which is a different analysis. (See *People v. Jones* (2001) 25 Cal.4th 98.)

had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) Remand is necessary.

Upon remand, if the court decides to resentence appellant pursuant to subdivision (d), "it must give a factual explanation supporting its finding of 'separate occasions' for each count sentenced under that subdivision." (*People v. Irvin*, *supra*, 43 Cal.App.4th 1063, 1072.) Additionally, if the court decides to sentence appellant pursuant to section 667.6, subdivision (c) and impose full, separate and consecutive sentences on counts it determines did not occur on a separate occasion, it must also provide a statement of reasons for this sentencing choice. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 347-348.)

III

Appellant contends the matter must be remanded to the trial court for it to determine all actual days he spent in custody through the date of resentencing. Respondent agrees. Appellant was originally sentenced on July 28, 2006, and the trial court awarded 1,000 days actual credit, plus 150 days of local custody credit. The abstract of judgment which was issued after appellant was resentenced on December 14, 2007, indicates the same calculation of credits. We agree with appellant that the trial court, having modified appellant's sentence on remand, was required in its new abstract of judgment to credit him with all actual days he spent in custody, whether in jail or prison up to that time. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 41.)

DISPOSITION

The matter is remanded to the trial court for resentencing and the court is to determine custody credits through the date the appellant is resentenced. The trial court is directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.